Supreme Court, U.S.
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No. 91-140

In the Supreme Court of the United States

OCTOBER TERM, 1991

AVERY BARBER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction for conspiring to distribute heroin.

2. Whether an agreement to distribute heroin is protected by the First Amendment.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 3a-9a) is unreported, but the judgment is noted at 935 F.2d 1282 (Table).

JURISDICTION

The judgment of the court of appeals was entered on May 23, 1991. The petition for a writ of certiorari was filed on July 19, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted of conspiring to distribute heroin and to

possess heroin with intent to distribute it, in violation of 21 U.S.C. 846. He was sentenced to concurrent terms of 165 months' imprisonment, to be followed by five years of supervised release. The court of appeals affirmed.

1. Pursuant to court-authorized electronic surveillance, police officers intercepted ten telephone calls between petitioner in Largo, Maryland, and co-conspirator William Gore in Bloomfield, New Jersey. Gov't C.A. Br. 7-11. On May 31, 1990, Gore telephoned petitioner and asked when he could supply one-half kilogram of heroin. Petitioner replied that he had visited his supplier in Los Angeles over the weekend and that the heroin would be available in one or two days for a price of $70,000. Petitioner stated that for future deliveries, the supplier wanted them to rent an apartment close to transportation in New Jersey. Once they secured an apartment, the supplier could make deliveries of as much as one kilogram per week. Gov't C.A. Br. 8.

On June 2, 1990, petitioner advised Gore that he had not yet heard from his supplier. The next day, petitioner told Gore that he was working on cutting, packaging, and distributing heroin that had cost him $75,000. He reminded Gore that the supplier wanted them to obtain an apartment for use in receiving heroin. The following day, petitioner told Gore that he had spoken to his supplier but that the heroin had not arrived. Gov't C.A. Br. 9.

On June 8, petitioner telephoned Gore to tell him that he was still trying to get heroin from his California source. Petitioner also told Gore that he was busy packaging heroin. On June 13, petitioner advised Gore that he had met his Los Angeles supplier in New Jersey, that the courier was scheduled to

leave Pakistan that day, and that he would purchase the heroin that weekend. On June 20, petitioner told Gore that the delivery would be ready on Monday and that he needed cutting agents. Gov't C.A. Br. 9-10.

On the last day of the wiretap, June 25, petitioner told Gore that he was going to see his supplier. In a later telephone call, petitioner indicated that he was still waiting for his supplier but that he had looked at some other heroin. Petitioner explained that the delay in the delivery of the heroin was caused by the death of the supplier's father. Petitioner also told Gore that he had obtained a pound of inositol, which is used in cutting heroin. Gov't C.A. Br. 10-11.

Petitioner was arrested on July 23, 1990. Telephone toll records from petitioner's house revealed 29 calls to six different numbers in Pakistan and 37 calls to Los Angeles between May 25 and June 27, 1990. Gov't C.A. Br. 11, 12.

2. The court of appeals affirmed. Pet. App. 3a-9a. The court held that the taped conversations were sufficient to show that petitioner intended to distribute heroin. The court rejected petitioner's argument that the evidence proved only that preliminary negotiations were under way. Pet. App. 7a. The court noted that petitioner "met with his supplier in Los Angeles and New Jersey, conversed frequently with people in Pakistan and Los Angeles, and made arrangements to establish a stash house in New Jersey." Pet. App. 8a. The fact that petitioner was unable to obtain heroin "is of no relevance," the court concluded, "since an agreement to distribute the heroin had clearly been reached, and since the conspirators apparently believed that heroin could be obtained." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 5-9) that the government was required to prove an overt act in order to convict him of conspiracy to distribute heroin, in violation of 21 U.S.C. 846, and that no such proof was presented at trial. He claims (Pet. 3) that his taped conversations with Gore were simply "idle, undesirable conversation, protected * * * by the First Amendment." Petitioner's claims are wrong both legally and factually.

1. To begin, the statutory language determines whether proof of an overt act is an essential element of a conspiracy offense. See *Singer* v. *United States*, 323 U.S. 338, 340 (1945) (statute proscribing conspiracy to evade service in the armed forces does not require proof of an overt act). See also *McMillan* v. *Pennsylvania*, 477 U.S. 79, 85 (1986) ("in determining what facts must be proved beyond a reasonable doubt the * * * legislature's definition of the elements of the offense is usually dispositive."). Section 846 does not require such proof:

> Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

In contrast, the general conspiracy statute, 18 U.S.C. 371, explicitly requires proof that "one or more of [the conspirators] do any act to effect the object of the conspiracy." See *Yates* v. *United States*, 354 U.S. 298, 334 (1957) (proof of an overt act required for a Section 371 conspiracy). Consequently, when Congress intended to require proof of an overt act, it knew how to do so.

Contrary to petitioner's suggestion, the circuits are not divided on the necessity of proving an overt act

to establish a drug trafficking conspiracy. In several of the cases on which petitioner relies, the defendant was charged with attempt, not conspiracy. See, *e.g.*, *United States* v. *Delvecchio*, 816 F.2d 859 (2d Cir. 1987); *United States* v. *Martinez*, 775 F.2d 31 (2d Cir. 1985); *United States* v. *Everett*, 700 F.2d 900, 907 (3d Cir. 1983). With respect to *United States* v. *Jones*, 765 F.2d 996 (11th Cir. 1985), petitioner misstates the court's holding. The Eleventh Circuit there held that an "overt act is not a necessary component of the crime." *Id.* at 1001. The court nevertheless reversed the conviction in that case because there was no agreement among the parties. *Id.* at 1002-1003. Petitioner also relies on decisions from the Ninth and Tenth Circuits. See *United States* v. *Melchor-Lopez*, 627 F.2d 886 (9th Cir. 1980), and *United States* v. *King*, 521 F.2d 61 (10th Cir. 1975). But those decisions have been overruled. In *United States* v. *Savaiano*, 843 F.2d 1280, 1294 (10th Cir.), cert. denied, 488 U.S. 836 (1988), the court held, in conformity with the "weight of authority," that "an overt act is not a necessary element of conspiracy under the federal drug enforcement statutes." 843 F.2d at 1294 (collecting cases). Likewise, in *United States* v. *McCown*, 711 F.2d 1441, 1450 (1983), the Ninth Circuit held that the government need not "prove any specific overt act in furtherance of [a drug trafficking] conspiracy."

In any event, this case does not squarely present the question whether proof of an overt act is necessary for conviction under Section 846 because the uncontroverted proof showed that petitioner committed several overt acts. For instance, during the period that petitioner and Gore were awaiting the receipt of heroin from Pakistan, petitioner's telephone

toll records showed that he made 29 telephone calls to Pakistan. Each call was an act made in furtherance of the conspiracy. During that same period, petitioner made 37 calls to Los Angeles, the location of his source. And, as petitioner admitted to Gore, he traveled to Los Angeles and New Jersey to meet with his source. In short, there was ample evidence in this case—in the form of conduct as well as words—to show that petitioner and Gore were not simply engaged in "idle * * * conversation," but that they had conspired to distribute heroin.

2. Petitioner also asserts (Pet. 8-9) that his conversations constituted speech that was protected under the First Amendment. That claim is frivolous. Petitioner was not discussing the merits of heroin use. Rather, he was conspiring to break the drug trafficking laws. It is sufficient that petitioner entered the agreement with the necessary criminal intent; his speech is not protected simply because his plan failed. Cf. *Dennis* v. *United States*, 341 U.S. 494, 510 (1951).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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